

were found. Inspector Tan Ghee Leong testified further that:

"When accused No. 2 produced box and things in it, he said something about it and contents. He said these things were brought by K. M. Packiam for him to keep in safe custody. This was what he said before leaving to collect the box and contents."

No one at the trial ever considered whether this evidence was admissible. The prosecution adduced it and there was no objection from defence counsel. The learned magistrate accepted it in all the implications of the words and perhaps more, but of course inadmissible evidence does not become admissible by reason of the failure of counsel to object thereto and an appellate court must disregard all such evidence: see *Wong Kok Keong v. R.*⁽¹⁾ at page 16.

On this evidence the learned magistrate considered that the prosecution had established a *prima facie* case against the appellants. He in fact referred to this evidence specifically in his grounds of decision and it is clear he relied greatly on it. He therefore held that on the evidence the first appellant was guilty of voluntarily assisting in the disposal and the second appellant of dishonestly retaining the stolen property.

The question therefore to be considered is whether it is admissible. If it is sought to be admitted as a confession by the second appellant, it is not in compliance with section 26 of the Evidence Ordinance and it is in violation of section 25. See also: *Lee Yew Seng and Ors. v. Public Prosecutor*.⁽²⁾ at page 216. But in its context it is clearly not a confession in the sense of an admission of guilt. If at all admissible, it was only an admission by the second appellant that he had received the goods but there was nothing in this admission to indicate that he had obtained such possession of the stolen articles and acquired such a knowledge of their origin that he should be said to have dishonestly retained them. As I read and understood the words, they were nothing more than an admission that he was constituted a bailee of these goods and in my view without any evidence that he knew of their dishonest origin, he could not be said to have been dishonestly in possession.

The next question that arises in the consideration of the admissibility of these words is whether they could be admitted under section 27 of the Evidence Ordinance. The previous doubt entertained whether evidence admissible under section 27 was not caught by section 124 of the Criminal Procedure Code has now been resolved in *R. v. Ramasamy*.⁽³⁾ which is a decision of the Privy Council on appeal from the Supreme Court of Ceylon on a legislation which is in *pari materia* with ours and is therefore binding on the courts of this country: see *Khalid Panjang and Ors. v. Public Prosecutor (No. 2)*.⁽⁴⁾ There it was held that evidence falling within section 27 could lawfully be given at a trial even though it would otherwise be excluded as a statement made in the course of an investigation under section 124 and that such statements to a police officer applied to both written records and oral statements and extended to an accused person as much as to any other witness, but the words admitted must be limited to and relate distinctly to the

A fact of discovery. In the light of this decision and following the example of the learned trial judge in that case which was commended by their Lordships of the Privy Council as being correct and fair, I am of the view that these words were not limited to and did not relate distinctly to the fact of the discovery and were therefore inadmissible under section 27.

B Lastly, it is apparent that even if these words were to come from the mouth of the second appellant in open court or were admissible in a confession properly taken in accordance with section 24 and section 26 of the Evidence Ordinance it is inadmissible as against the first appellant: see *Amin bin Mohamed v. R.*⁽⁵⁾ There would appear however to be a contrary decision *Surif v. Public Prosecutor*⁽⁶⁾ but this decision also laid down that though admissible against the other accused the confession which was a proper one could only be used to support other evidence and of other evidence, corroborative or otherwise, there was none in this case.

D The words are in my view clearly inadmissible on any score so that as against the second appellant, there is no need to consider the presumption against him under section 114(a) of the Evidence Ordinance.

E Once they are removed, all that the prosecution was left with was evidence that both the appellants knew where the stolen articles were left but there was not the slightest shred of evidence that the first appellant disposed of the property to the second appellant or that the second appellant dishonestly retained the property.

The convictions therefore could not stand. They are now quashed and the order for imprisonment set aside.

Appeal allowed.

F Solicitors: *Shearn Delamore & Co.; Daljit & Vijaya.*

G LEE THIAN BENG v. PUBLIC PROSECUTOR

[F.C. (Suffian, Gill and Ong Hock Sim FJJ.)

February 21, 1972]

[Kuala Lumpur — Federal Court Criminal Appeal
No. 17 of 1971]

H *Penal Code, ss. 99, 100, 102 and 325 — Voluntarily causing grievous hurt — Plea of private defence — When available — Necessary self-defence — Evidence Ordinance, 1950, s. 105.*

Criminal Law and Procedure — Manslaughter — Charge reduced to voluntarily causing grievous hurt — Plea of self-defence — Unnecessary excessive force — Plea failing.

I *Evidence — Burden of Proof — General exceptions in Penal Code — Onus on accused — Evidence Ordinance, 1950, s. 105.*

The appellant had been tried on a charge of culpable homicide not amounting to murder. At the close of the prosecution case the charge against the appellant was reduced to voluntarily causing grievous hurt under section 325 of the Penal Code and he was convicted on this charge and sentenced to three years' imprisonment.

On appeal,

Held, dismissing the appeal: (1) the prosecution in this case had established beyond any reasonable doubt that the appellant used a weapon aimed at the face of the deceased and that it was the injury so caused which resulted in death;

(2) in this case the appellant had made a dastardly attack on a man physically very much his inferior using a vicious weapon when no resort to force was necessary and therefore the plea of private defence must fail.

Observations on right of private defence.

Cases referred to:-

(1) *Palmer v. R.* [1971] 2 W.L.R. 831, 839.

(2) *R. v. McInnes* [1971] 1 W.L.R. 1600, 1608.

FEDERAL COURT.

Edgar Joseph Jr. for the appellant.

Gurn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ong Hock Sim F.J. (delivering judgment of the court): The appellant was tried in the High Court at Kuala Lumpur on a charge of culpable homicide not amounting to murder, punishable under section 304 of the Penal Code, for causing the death of Robert Kut Lung Lee. At the close of the prosecution the learned trial judge found that no case had been made out against a co-accused who was thereupon acquitted. The charge against the appellant was then reduced to voluntarily causing grievous hurt, under section 325, upon which he was convicted and sentenced to three years imprisonment.

The tragic event occurred in the Flora Palace Bar at Jalan Raja Laut in Kuala Lumpur at about 11 p.m. on August 20, 1970. Certain facts were not in dispute. The appellant went into this drinking saloon at about 9 p.m. and occupied table No. 15 with three companions. He was a chief inspector of police but was off duty and not in uniform. At about 11 p.m. a party of five, including Robert Lee, the deceased, came in and occupied an adjoining table No. 11, about 6 feet away. Shortly afterwards some glasses were thrown and smashed, fragments of which were subsequently found scattered near tables Nos. 11 and 15. The deceased and one of his party went up to table No. 15 to expostulate. The appellant denied having thrown anything. He could at this juncture have announced to the deceased his identity and rank, but it was perfectly clear that he did not.

Of what happened thereafter there were two conflicting stories told by the main prosecution witnesses. Teoh Kim Seng, a contractor, and Teo Ching Siong, a tin mine manager, both of whom were members of the deceased's party, gave one version agreeing in all material particulars as to how the deceased came by his fatal injuries at the hands of the appellant. The trial judge, without any acknowledgment that he accepted their evidence, came to a finding of fact which in effect stamped the evidence of these two witnesses as true on this vital issue. In his judgment the judge nowhere discounted or expressed any doubt or disbelief of their testimony.

The appellant told a different story, which again tallied in all material respects with that of a prosecution witness, Kwok Kit Leng, then an inspector of police in the C.I.D., Intelligence Branch, Selangor,

since retired and employed by Securicor in Singapore. The judge took this view of the appellant's evidence:—

"As regards the evidence of the accused as a whole, I do accept the evidence stated by him regarding the circumstances that led to the argument, but I am convinced that he was not telling the truth regarding the circumstances pertaining to the blows delivered on the deceased after the deceased was disarmed."

It will be observed that the above remarks drew a clear line between two stages in the events of that night. He believed the appellant's evidence as to events preceding the infliction of fatal injuries on the deceased. Such evidence was not in effect material in determining the guilt or innocence of the appellant, nor was it in conflict with the testimony of Teoh Kim Seng and Teo Ching Siong. In what was crucial to the success of the appellant's defence, however, the judge unhesitatingly rejected his evidence. Such evidence tallied closely with the evidence of Inspector Kwok Kit Leng. It goes without saying, therefore, that the judge was equally convinced that this inspector was by no means a truthful witness.

The evidence of Teoh Kim Seng was as follows:—

"We went to table 11. After we had sat down, a waitress came and asked us what we wanted to drink. Robert Lee ordered half a bottle of Martell. She brought the brandy for us. After she had poured out the brandy, I heard the sound of the breaking of a glass near our table. I did not see. No one from our table did anything. We just kept quiet. After a while I heard the breaking of another glass. The glass hit the leg of Robert Lee. Robert Lee stood up and went to the neighbouring table and I followed him. Robert Lee spoke to those persons sitting at the table and told them not to throw glasses as we all went to the bar to drink and have fun. Those people were very aggressive. Robert Lee patted the back of one person and said 'sorry' to him. He is the first accused (that is, the appellant)... After Robert Lee had said 'sorry' to the first accused, both of us returned to our table. After we had sat down, 4 or 5 persons came to our table. They were from table 15. Among those who came over were the first accused and the second accused. They came with glasses and bottles. They threw the glasses and bottles near us. The first accused said, 'Now I am throwing the bottle and glasses, what are you going to do?' While the first accused was saying these words the second accused was standing next to him. They did not do anything but just stood there. Robert Lee became frightened and fired a shot. They smashed our chairs. When I said 'they' I mean the first accused and his friends. The first accused and his friends did not go back to their table. Robert Lee stood up and fired a shot at the ceiling....

After Robert Lee had fired, the first accused, who then had a black object in his hand, punched Robert Lee. The lighting was not very bright in the bar. Robert Lee was thin and small sized. When the first accused punched Robert Lee, he fell to the ground on his back. Robert Lee was only up to the shoulder of the first accused. Robert Lee fell backwards — face upwards. Robert Lee's revolver was taken away by the first accused. After the first accused had taken away the pistol, Robert Lee turned over with his face downwards. He wanted to get up. The first accused pointed the pistol at me and asked me not to move him. Teoh Kim Siong (*sic.* for Teo Ching Siong) told the first accused not to assault Robert Lee because he was the son of Tun Lee. The first accused said, 'I don't care whether he is the son of Tun Lee. I still want to assault.' Having said those words, the first accused kicked Robert Lee and the second accused also kicked him.... I together with my friend Teoh Kim Siong went forward and helped Robert Lee up. At that time all the lights were on. When we carried Robert Lee he was unconscious and there was blood on his body — on his face."

Under cross-examination this witness went on to say that the appellant did come up and ask "Did you see

me throw?" At that stage he denied seeing inspector Kwok Kit Leng who, it was suggested, came up to intervene. He agreed that as soon as the shot was fired the lights were turned on. Put to him that when the light was on Robert Lee was seen holding a gun and that the gun was pointed at the appellant the witness' answer was:

"No. When the light was switched on, Robert Lee was lying on the floor. How could he hold a gun in his hand?"

The gun, he went on to explain, was taken away by the appellant after he had punched Robert Lee. Counsel for the appellant then proceeded step by step to put the appellant's defence to the witness, suggesting that after Robert Lee had been punched and disarmed, there followed a further scuffle when Robert Lee attempted to recover his gun. To all the suggestions so put, the witness denied flatly that anything had happened as alleged.

The other eye-witness Teo Ching Siong thus described the crucial episode:

"One of two persons from the other side said, 'Did you see us throw glasses?' I cannot say who said this. Then he threw the glasses — one of them landed on the floor very close to the edge of the table. At that juncture I saw 2 or 3 persons coming from the other table and I saw Robert Lee standing up. He left the table taking two steps. He moved backwards two steps. Then he fired a shot into the air. Then I saw a person taking something from his pocket and punching Robert Lee.... He is the first accused. I do not know what was that in his hand. Robert Lee fell down. The first accused then went and grabbed Robert Lee's gun."

This witness, under cross-examination, also denied that the deceased after being felled, regained his feet and attempted to wrest his gun away from the appellant. This, of course, was the appellant's case.

It is now necessary to set out the very different story as told by inspector Kwok Kit Leng. To quote him:—

"When the argument started, I left the table and I proceeded to the place where they had the argument. I asked inspector Lee [the appellant] what was the matter. Inspector Lee told me that the new arrivals had accused him and his friends of throwing glasses at them. Inspector Lee told me he did not do it. I spoke to the person standing next to me among the newest arrivals saying that since they had wrongly accused inspector Lee, they might as well say 'sorry' and forget the matter. There was no reply. I did not ask the other side.

At that juncture I heard a shot fired from a corner towards us. The light was very dim. Someone shouted for the lights to be switched on. The lights were switched on. It was still dim. I noticed a person (the deceased) holding a gun in his right hand. It was pointed at the direction of inspector Lee.... I told inspector Lee not to move. I said I would walk towards the man at an angle. My idea was to tell him that I was a police officer and to tell him to drop the gun. When I was half-way towards the man holding the gun, his attention was distracted towards me. At this stage inspector Lee rushed forward to disarm the man. I did not exactly see how it happened. There was a scuffle between inspector Lee and the person with the gun and one or two persons joined in.... The next thing I saw was inspector Lee holding the gun and that person lying on the floor. The next thing I saw was that person was on his feet trying to repossess his gun.... There was another brief struggle between the two. That person was trying to regain possession of the gun. I did not see what actually inspector Lee did. Next I saw Robert Lee running for his life towards the toilet. During the second scuffle, inspector Lee was still holding the gun. I was

then 6 to 7 feet away. As he ran he knocked against a table. I did not observe which part of his body knocked against the table. Robert Lee leaned against the table for a few seconds to regain his balance and then started running towards the toilet again. The injured person was followed by Inspector Lee and two of his friends. On reaching the entrance to the toilet, he hung on to the toilet door for three to four seconds and then fell face downwards. I saw two of his friends turning him over. They dragged him out to a waiting vehicle."

In answer to the court this police inspector said:—

"When the first accused [appellant] disarmed Robert Lee, he threw a punch at him. In the process of disarming, he threw a punch. In preventing Robert Lee from regaining possession of the gun, inspector Lee gave Robert Lee a punch or two. I did say that. When I spoke of Robert Lee 'running for his life' I meant he was running away".

This ex-police officer had been a police officer of 19½ years' standing who claimed that he was "trained to observe". Doubtless it was because he remembered only immaterial details in his examination-in-chief, but "*did not see exactly*" what happened during the first scuffle and again "*did not see what actually*" the appellant did in the second scuffle, which prompted the judge to ask the questions he did. Then, suddenly and surprisingly his recollection of the crucial details which he had been withholding became crystal clear.

The most striking feature of the evidence of these two experienced police officers was their inexplicable reticence about their identity and status. Had the appellant in the very first place declared himself to the deceased, when wrongly accused, it is incredible that any sane man, however drunk, would have acted as the deceased was alleged to have done. When inspector Kwok came up to intervene, what would have been more natural than for him to inform, in loud terms, all and sundry present, that both he himself and the appellant were police inspectors and order the deceased to put away his weapon? Instead, he would have the court believe that he acted as if he were confronting a man suddenly run amok, yet a man whom a few moments earlier he could advise to apologise and overlook what happened. Only a few moment's reflection on the evidence of both the appellant and inspector Kwok is necessary to convince this court, as the learned trial judge was convinced, that their evidence on the crucial fact as to how the deceased was fatally injured, was wholly untrue. For instance, he must have been closer to and facing the deceased when the appellant rushed forward to disarm the deceased, if his story was true.

In the circumstances, having rejected the story of the appellant, which inspector Kwok so stoutly attempted to corroborate, were there any grounds for the learned trial judge not to have accepted the version of Teoh Kim Seng and Teo Ching Siong? Loke Keng Yoke, the bar-girl, was an independent witness who fully corroborated the evidence of Teoh and Teo that it was the appellant and his companions who were the aggressors, apparently spoiling for a fight to teach the deceased a lesson. True that Teoh and Teo did tell unnecessarily a blatant untruth that, for some 6 hours since 5 p.m., none of them, including the deceased, had imbibed any alcohol, although not teetotallers. This may not unfairly be categorised as

a white lie. There was clear proof afforded by a test of the blood taken from Robert Lee showing that there were 165 milligrammes of ethyl alcohol per 100 millilitres of blood, a percentage of 0.165. But, save in this one respect, the evidence of these two witnesses stood unshaken despite the severest cross-examination. It has in our opinion the ring and hallmarks of truth and, by any test against the evidence of other witnesses or against the logic of experience and probabilities, still remains convincing. The judge made no comments whatsoever evincing any doubt as to the truth of their testimony. All too clear also he was in no way unfavourably impressed by their demeanour.

With all respect, therefore, we feel that the judge erred in substituting for statements of fact, asserted by these two witnesses, his own explanation for the *manner* in which the deceased came by his injuries. His conclusion appears to have been arrived at — contrary to all the evidence — by a process of inductive reasoning which, with respect, is demonstrably untrue. He explained his conclusions as follows:—

"Now, on the evidence of PW18 [Inspector Kwok], it appears clear that the injury to the eye could not have been caused by the punch the accused delivered when he disarmed the deceased. The only reasonable conclusion of fact that the court can draw in the light of the evidence, is that the fatal injury was caused by this gun (P1). PW18 testified that the accused delivered one or two punches at the deceased when the deceased rushed at the accused. At that moment, the accused had the gun in his hand. Although there is no evidence to show in which hand the accused was holding the gun, I am inclined to think that the natural tendency of a normal right-handed person is to hold a gun in his right hand. The deceased sustained the injury on his left eye, the likely position a blow would land if delivered by a person using his right hand aimed at the person directly facing him. In my view, the irresistible conclusion that I can draw on these facts is that the accused used the right hand holding the gun to deliver the punches. The medical evidence reveals that a rounded fracture cavity was found in the roof of the left orbit and the depth of the internal penetration is at least 3 c.m. from the left eye lid. The left upper eyelid was almost completely torn off. Judging from these injuries, there is again the irresistible conclusion that the injury sustained by the deceased could not have been caused in any other way other than by a deliberate blow or blows delivered by the accused.

The accused stated that the deceased suddenly rushed at him and in trying to prevent the deceased from regaining possession of the gun, he gave the deceased one or two punches at the body. With both hands, the deceased caught hold of his left hand that held the gun. In the light of the evidence which I stated earlier on, I am unable to hold that the injury sustained by the deceased could have been caused accidentally in the course of the attempt made by the deceased to regain possession of the gun."

With respect, we do not think it necessary for the judge to have sought an explanation for the deceased's injuries consistent with the use of the Mauser — even if the learned prosecutor had a closed mind on this point. We have examined the Mauser which is a large cumbersome weapon 12 inches long and could not have failed to attract notice had it in fact been used in any manner or at any time so as to cause the deceased's injury. The two Teohs had described the weapon they saw used and their evidence was fully corroborated by the nature of the deceased's injuries. Both stated that the deceased was bleeding profusely after the first punch. A knuckle-duster, for

instance, could have been the black object seen by the witnesses. And why not?

The judge was perfectly satisfied that the deceased's fatal injuries were caused by the appellant and counsel arguing this appeal has been unable to suggest that any other person was responsible for it. According to the pathologist, Dr. Chan Choe Fatt, the deceased's left upper eye-lid was almost completely torn off by a ragged wound and the eyeball was protruding from its orbit. The cause of death was extensive brain injury, resulting from fracture of the skull. The injury to the brain was the result of the injury extending from the left eye and the fracture cavity in the skull measured 2.5 c.m. in diameter; the depth of internal penetration was at least 3 c.m. from the eye-lid. The external and internal injury above described was likely to have been caused by a single blow.

The evidence of Teoh Kim Seng and Teo Ching Siong was that after the deceased was felled by the appellant with a blow to the left eye the deceased never managed to regain his feet. He could only turn over — perhaps, it may be surmised, in his agony. He had to be carried out unconscious, and all the medical evidence was to the effect that he remained in a state of coma till his death on August 26. None of the doctors who gave evidence was asked by defence counsel whether it was possible for a person so badly injured in the brain and skull to have got up again — much less to have tried to fight for re-possession of his gun against a man described as twice his size. It is also only too clear that a bare fist could not possibly have caused penetration of the eye to the depth of 3 c.m. The Mauser was in the deceased's hand when the first blow was struck. Therefore, Teoh Kim Seng and Teo Ching Siong were undubitably telling the truth when they said that the appellant held in his hand a dark heavy object, "very small" according to the former, when he dealt the fatal blow. It was thus needless for the judge to speculate and seek an explanation for the use of the deceased's own Mauser as the cause of the eye injury — which necessarily postulates the fiction of a second struggle. True that the black object was never found and produced in evidence by the prosecution. But it is perfectly clear that the appellant was never searched by any police officer until he arrived unescorted and voluntarily at the Campbell Road police station to make his report. So he had every opportunity of disposing of the weapon — whatever it might have been. His first police report was manifestly untrue. He was never shot at, and if he was not scrupulous on this point, what reliance can be placed on his allegation that the gun was then pointed at him?

The prosecution had therefore established beyond any shadow of doubt that the appellant used a weapon capable of penetrating to a depth of 3 c.m. aimed at the face of the deceased and that it was the injury so caused which resulted in death.

In this appeal reliance was placed on the right of private defence, alternatively that the injury was caused by a pure accident, in the further alternative

by an act done under grave and sudden provocation, or again, by an act done rashly or negligently. In this connection the appellant's own evidence is most important. He justified his action solely on this ground:—

"I rushed forward to grab the gun. I did this because I considered it my duty as a police officer to disarm him for the safety of his life as well as for the safety of the lives of the people in the bar. At that time I also thought of self-defending myself (*sic.*)"

Since his arrest on November 15, 1970, if not before, the appellant had had the benefit of legal assistance and advice. So, when he gave evidence on his own behalf on October 15, 1971 his defence must have undergone the most diligent preparation. As a police officer of 19 years' standing he did not claim provocation. He must be deemed to have so elected deliberately. The learned trial judge was therefore quite right in saying nothing about it, as well as to rule out accident, in the circumstances. Rightly too had the charge been reduced to one under section 325 because under section 304 the intention to cause death or the knowledge that death will probably be caused is an essential ingredient of the offence under such section.

Turning to the plea of private defence, section 99 of the Penal Code provides that the right of private defence in no case extends to the infliction of more harm than is necessary to inflict for the purpose of defence. Subject thereto, section 100 provides that the right of private defence extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence; and it continues as long as such apprehension of danger to the body continues. The plea of private defence is one of the general exceptions set out in Chapter IV of the Penal Code, proof of which by virtue of section 105 of the Evidence Ordinance, rests on the accused. In a few words the principles to be applied in this case have been set out as above.

We have, on the whole of the evidence, come to the conclusion that the right of private defence cannot avail the appellant. In the first place, any use of force was absolutely unnecessary at any time — even if it was a fact as alleged by the appellant and inspector Kwok Kit Leng (which we disbelieve) that the deceased did point his gun at the appellant. Had the appellant announced that he was a police inspector when the deceased came over to his table to complain, the argument or altercation would in all probability have been nipped in the bud. According to both Teoh Kim Seng and Teo Ching Siong (supported by the bar-girl on this point) it was the threatening attitude of the appellant and his friends which frightened the deceased and made him get up and retreat two steps before he fired a shot into the air, after which he was floored the next moment by

A the blow which killed him. Where, then, was the occasion or opportunity for the deceased to aim his gun in a threatening gesture?

B Even when threatened the deceased fired, not at or towards his advancing foes, but up in the air. After this shot, would not peace have been restored, had the appellant or his brother officer called out that they were police officers? Announcing their identity is the very first lesson imparted to a police constable. It is, therefore, wholly inconceivable that both officers, each with nearly 20 years of experience, could have failed to do so, from force of habit, unless the appellant deliberately refrained because he wanted to teach the deceased a lesson and give him a thrashing. C As he had testified he considered it his duty as a police officer to disarm the deceased. Before taking any forcible action should he not have identified himself first? In the case of inspector Kwok, it was plain that he deliberately set out to help his friend. Unaware of the true identity of the advancing foe, who might have been thugs, was the deceased not acting reasonably when, fearing for his own safety, D he fired only into the air? The plain and easy way out of the dangerous situation was for the appellant simply to disclose his identity.

In the second place, it is clearly the law, with regard to the use of force in self-defence, that there must be no alternative to its recourse. As Lord Morris of Borth-y-Gest said recently in *Palmer v. The Queen*⁽¹⁾:—

E "An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death has resulted. In its simplest form the question that arises is the question: Was the defendant acting in necessary self-defence?"

F At page 843 his Lordship went on:—

G "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive

action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider, in agreement with the approach in the *De Freitas* case [1960] 2 W.I.R. 523, that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case."

That was a decision of the Privy Council which the Court of Appeal in England has unhesitatingly accepted in *Reg. v. McInnes*.⁽²⁾

In the instant case the use of force was manifestly unnecessary: The appellant had only to say he was a police officer to nip even the verbal argument in the bud. In the use of force, the appellant would have a decided advantage over the deceased. As he admitted "I am much bigger in size than him". He naturally denied using any weapon because he must have realised that its use was excessive and cruel. In our view the appellant had made a dastardly attack on a man physically very much his inferior, using a vicious weapon when no resort to force was necessary. The deceased after remonstrating to the appellant over the throwing of glasses had apologised and returned to his own table. There the matter should have ended but for the appellant's own conduct in going over to the deceased's table and there creating occasion for the infliction of the fatal injury. The plea of private defence therefore fails and the appeal must be dismissed. With regard to sentence, in the light of the observations we have just made, we do not consider the term of three years in any way excessive and we accordingly affirm it.

Appeal dismissed.

Solicitors: *Joseph & Son.*

KIM CHOI v. IBRAHIM: LIANG TET, 3RD PARTY LIANG TET v. IBRAHIM & ANOR.

[O.C.J. (Suffian F.J.) March 20, 1972]

[Kuala Lumpur — Raub Civil Suit No. 26 of 1968 and
Raub Civil Suit No. 37 of 1968]

*Damages — Fatal accident — Contributory negligence
— Quantum — Interest.*

Road Traffic — Fatal accident — Damages.

*Damages — Leg — 1½" shortening — Fracture of clavicle
— Pain and suffering.*

These consolidated suits concerned claims for damages for injuries sustained by the respective parties in a road accident between a lorry and a scooter. The scooter rider died and his pillion rider the plaintiff in suit No. 26 was injured.

In suit No. 26, the plaintiff Kim Choi sued the defendant, Ibrahim, the lorry driver, and in suit No. 37, the plaintiff Liang Tet, the father and administrator of the estate of the deceased scooter rider, sued both Ibrahim and his employer. He was also cited as third party in the first suit.

The questions for decision in these suits were, first, who was to blame for the accident; secondly, if Ibrahim was to blame, was he wholly or partly to blame; and thirdly, the quantum of damages payable.

Held: (1) the defendant lorry driver was 2/3 to blame, and the deceased 1/3 to blame for the accident;

(2) the plaintiff in suit No. 26 was to be awarded general damages of \$12,500 and agreed special damages of \$300. The defendant in the same suit was to pay the plaintiff the said sums in full, with interest at the rate of 6% on general damages from the date of issue of the writ until judgment, and 3% interest on special damages from the date of the accident until judgment, and costs. The defendant was entitled to a contribution by the third party to the extent of 1/3;

(3) the plaintiff in suit No. 37 was to be awarded general damages of \$3,500 and agreed special damages of \$1,000. However, as the deceased was 1/3 to blame for the accident, the defendants were to pay the plaintiff 2/3 of each of the above figures with interest on the first sum at 6% from the date of issue of writ until judgment, and on the second sum at 3% from the date of the accident until the date of judgment.

Cases referred to:-

(1) *Lang v. London Transport Executive* [1959] 3 All E.R. 609.

(2) *Fruitnight v. George Wallis Ltd.* (Bingham's All the Cases on Negligence, 1st Edn. p. 210; 2nd Edn. p. 193).

(3) *Shenley v. G.L. Newman Ltd.* (Bingham's All the Modern Cases on Negligence, 1st Edn. p. 211; 2nd Edn. p. 194).

The following cases were also cited in argument: *Mohamed Repin v. Lim Yu Kee* [1969] 1 M.L.J. 64; *Ong Sim Moy & Ors. v. Ong Sim Hoe* [1969] 1 M.L.J. 82; *Tan Teck Suan v. Peter John Giles* [1968] 2 M.L.J. xxii; *Lee Kwang Meng & Anor. v. Lee King Soong* [1970] 1 M.L.J. xv; *See Toh Kin v. Chin Yin Fui* [1964] M.L.J. lix; *Teo Kim Ngo v. Chua Kim Liang & Anor.* [1964] M.L.J. lix; *Cheong Yuen Khiong & Anor. v. Lye Joo Seng* [1966] 2 M.L.J. xx; *C. Chinnappan v. Pansy Yau* [1966] 1 M.L.J. xxxiv; *Yew Chek Hwa v. Mathews* [1970] 1 M.L.J. xvi; *Ong Siew Yan & Ors. v. Donwilson Weersekra* [1967] 2 M.L.J. xxviii; *Foo Meun Sin & Anor. v. Joseph Navaratnam* [1967] 2 M.L.J. xxviii; *Raja Piah binte Dig Meliwa & Children v. Chua Joo Tee* [1967] 2 M.L.J. xxix; *Aminah binte Abdullah & Ors. v. Lim Kim Kher* [1967] 2 M.L.J. xxix; *Ban Pet Hock v. Ong Ah Ho* [1966] 2 M.L.J. 253; *Yee Boon Heng v. Tan Chwee* [1967] 2 M.L.J. 157; *Foong Nan v. Sagadevan* [1971] 2 M.L.J. 24; *Cheong Yuen Khiong & Anor. v. Lye Joo Seng* [1966] 2 M.L.J. xx.

SUIT.

David Tay for the plaintiff in Suit No. 26 of 1968.

M. A. Marjoribanks for the defendants in both suits.

G *L. T. Oon* for the third party and the plaintiff in Suit No. 37 of 1968.

Suffian F.J.: In these consolidated suits the agreed facts are as follows. On 25th June, 1967, at about 3.15 p.m. Kim Choi the plaintiff in Suit No. 26, whom I shall refer to as the first plaintiff, was travelling pillion on scooter PC91 ridden by one Liang Chin Sam. The scooter was travelling from the direction of Karak towards Mentakab town. Just outside Mentakab town near the railway crossing it collided with motor lorry BL 6847 which was being driven in the opposite direction by Ibrahim, the defendant in Suit No. 26 and the first defendant in Suit No. 37, whom I shall refer to as the first defendant, employed by Yap Beng Kong, the second defendant in Suit No. 37, and whom I shall refer to as the second defendant. As a result of the accident the scooter rider died and his pillion rider, the first plaintiff, was injured. I shall refer to the scooter rider as the deceased.

In Suit No. 26 the first plaintiff sues the first defendant Ibrahim the lorry driver and in Suit No. 37